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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BARBARA JACKSON BURKS,

Plaintiff and Appellant,

v.

ALAMEDA HEALTH SYSTEM,

Defendant and Respondent.

A149975

**(Alameda County
Super. Ct. No. RG15789682)**

The trial court sustained Alameda Health System's (AHS) demurrer to Barbara Jackson Burks's medical malpractice complaint without leave to amend, concluding the one-year statute of limitations in Code of Civil Procedure section 340.5 barred the complaint.¹ The court dismissed the complaint with prejudice. Burks appeals, contending the limitations period in section 340.5 does not apply, and that her complaint was timely filed pursuant to the Government Claims Act (Gov. Code, § 945.6).

We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2015, Burks filed a medical malpractice complaint against AHS alleging "she suffered nerve injury following the improper insertion of a pre-operative

¹ All undesignated statutory references are to the Code of Civil Procedure.

needle” at Highland Hospital in August 2014.² The complaint alleged AHS is a government public health system and that Burks complied with the Government Claims Act, Government Code section 945.6.

AHS demurred, arguing section 340.5’s one-year statute of limitations barred the complaint because Burks was injured in August 2014 and did not file her complaint until October 2015. AHS noted Burks’s complaint alleged compliance with Government Code section 945.6, but that the one-year statute of limitations in section 340.5 applied because “it would be contrary to the goals of the statutes to apply a statute that would provide for a longer period in which to file a complaint.” In opposition, Burks argued section 340.5 did not apply because the “claims periods promulgated in the Government Claims Act are controlling as to actions against public entities” and that section 945.6 “effectively tolls any general statute of limitations.” Burks contended she complied with Government Code section 945.6 by submitting a claim against AHS within six months of her injury, and by filing the complaint within six months of the rejection of her claim.

Following a hearing, the court sustained AHS’s demurrer without leave to amend and dismissed the complaint with prejudice. The court determined the one-year statute of limitations in section 340.5 barred the complaint. It rejected Burks’s argument that the complaint was timely under Government Code section 945.6, concluding, “in a case involving medical malpractice, a plaintiff must comply with the statutes of limitation of both . . . section 340.5 and of Government Code section 945.6. (See *Roberts v. County of Los Angeles* (2009) 175 Cal.App.4th 474, 480-487 [(*Roberts*)].)”

² On an appeal from an order sustaining a demurrer, we generally “accept as true the properly pleaded material factual allegations of the complaint, together with facts that may properly be judicially noticed.” (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672.) Here, the complaint is not part of the appellate record. We “base our understanding of the parties’ dispute on the portions of the record cited” in AHS’s brief because Burks’s opening brief does not cite to the record, in violation of Rules of Court, rule 8.204(a)(1)(C), which requires “litigants to ‘[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.’ ” (*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 556, fn. 1.)

DISCUSSION

When a demurrer is sustained on the ground that a claim is time barred, application of the statute of limitations is a “purely legal question” and we review the lower court’s ruling de novo. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.) Burks claims her complaint was timely under Government Code section 945.6, which “is controlling, not . . . section 340.5.” We disagree.

“Government Code section 945.6 requires that suit be brought against a public entity no later than six months after the public entity that receives a claim rejects it [Citation.] [¶] Meanwhile, . . . [S]ection 340.5, enacted as part of MICRA . . . reads in relevant part, ‘In an action for injury or death against a health care provider based upon such person’s alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.’ ” (*Roberts, supra*, 175 Cal.App.4th at pp. 478-479.) Burks does not argue the three-year statute of limitations applies.

Roberts is on point. In that case, the plaintiff “met the claim filing deadline contained in Government Code section 945.6” but filed her complaint “beyond the three-year period of limitations in . . . section 340.5.” (*Roberts, supra*, 175 Cal.App.4th at p. 477.) The trial court concluded section 340.5 barred the complaint and the plaintiff appealed, arguing the limitations period in the Government Claims Act “supplant[s]” the limitations period in section 340.5 “when the defendant is a public entity health care provider.” (*Id.* at pp. 477, 479.)

Roberts traced the development of the Government Claims Act and section 340.5 and determined “the Legislature’s purpose in enacting the two statutes of limitations and the foregoing time-honored principles of statutory construction compel the conclusion that plaintiffs must comply with both the six-month statute of limitations in the Government Claims Act and the three-year statute in MICRA when bringing actions for medical negligence against public entities where the latter deadline is the outside date by which plaintiffs must file their suits against public entity health care providers. Plaintiff’s

complaint, although timely under Government Code section 945.6, was filed more than a year after the expiration of the three-year date in . . . section 340.5. Therefore, the trial court did not err in ruling that the complaint was untimely filed.” (*Roberts, supra*, 175 Cal.App.4th at pp. 486-487.)

The rule from *Roberts* is “[t]he relevant Government Claims Act claim filing deadlines and limitations periods . . . do not supplant the [section] 340.5 limitations periods with respect to malpractice actions against government entity health care providers: Plaintiff must satisfy both limitations periods, with [section] 340.5 setting the outside limit.” (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2016) ¶ 5:175a, p. 5-153; see also 1 Cal. Affirmative Def. (2017 ed.) § 25:36, p. 1769 [suit alleging negligence of a public-entity health-care provider must comply with the statute of limitations in the Government Claims Act *and* the statute of limitations in section 340.5].)

Here, the complaint alleged timely compliance under Government Code section 945.6, but the complaint was *untimely* under section 340.5, “the outer limit by which a lawsuit must be filed against a public health care provider.” (*Roberts, supra*, 175 Cal.App.4th at p. 481.) Under *Roberts*, the court properly concluded section 340.5 barred the complaint, which was filed more than a year after Burks’s injury. (*Roberts*, at pp. 486-487.) Burks does not discuss *Roberts* in her opening brief, and she has not filed a reply brief responding to AHS’s reliance on the case. We are not persuaded by Burks’s discussion of *Roberts* at oral argument.

Burks relies on *Brown v. Huntington Beach Etc. Sch. Dist.* (1971) 15 Cal.App.3d 640, and *Schmidt v. Southern Cal. Rapid Transit Dist.* (1993) 14 Cal.App.4th 23, but these cases do not assist her. As *Roberts* explained: “Neither case involved MICRA or the negligence of a health care provider and so MICRA’s legislative goal of curbing *medical negligence* lawsuits by use of its strict limitations periods was never at issue in

those cases.”³ (*Roberts, supra*, 175 Cal.App.4th at p. 486, fn. 6.) Burks’s reliance on *Anson v. County of Merced* (1988) 202 Cal.App.3d 1195 (*Anson*) does not alter our conclusion. (See *Roberts*, at pp. 483-484.) We also note that in *Anson*, the complaint was filed within the one-year statute of limitations set forth in section 340.5. (*Anson*, at pp. 1198-1199; see *Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal.App.4th 978, 982, fn. 3.) Here, the complaint was filed after the one-year statute of limitations expired.

DISPOSITION

The judgment is affirmed. AHS is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278.)

³ Burks’s suggestion that Government Code section 945.6 and section 340.5 “may conflict” been rejected by *Roberts*. (See *Roberts, supra*, 175 Cal.App.4th at pp. 481, 483.)

Jones, P. J.

We concur:

Simons, J.

Needham, J.